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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-869

KEITH ROBERTS, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1-32) is reported at 521 F.2d 298. The opinion of the Civil Aeronautics Board and the initial decision of the Administrative Law Judge are not yet offically reported.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1975. A petition for rehearing and suggestion for rehearing *en banc* was denied on November 20, 1975 (Pet. App. B, pp. 33-36). The petition for a writ of certiorari was filed on December 19, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 49 U.S.C. 1486(f).

QUESTION PRESENTED

Whether the Civil Aeronautics Board has the power to pass upon the reasonableness of past rates charged during a period in which they were unlawful due to procedural defects in the Board's order approving them.

STATUTE INVOLVED

Pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*, are set forth in Appendix C of the petition, pp. 37-39.

STATEMENT

1. In August 1969, several scheduled air carriers filed with the Civil Aeronautics Board (the "Board") proposed tariff revisions increasing their domestic passenger fares approximately ten percent. In response to a complaint filed by Representative John E. Moss and 24 other Congressmen, and in exercise of its powers under Section 1002(d) and (g) of the Act, 49 U.S.C. 1482(d) and (g), the Board suspended the proposed tariffs and ordered an investigation into their reasonableness. The Board also set forth its own fare formula, permitting fare increases of approximately six percent, which it said it would accept without suspension if implemented by the carriers (Order 69-9-68). The carriers accepted this invitation and new tariffs embodying the Board's proposed formula were filed and became effective October 1, 1969, over the continuing objection of complainants.

On petition for review in the Court of Appeals for the District of Columbia Circuit, the court ruled that Order 69-9-68 was invalid because the Board, by announcing a fare formula that it would accept, had engaged in ratemaking without compliance with the notice and hearing requirements of Section 1002(d) of the Act. The court also held that, given the coercive nature of the

Board's Order, the rates established on October 1, 1969, were not carrier-made rates for which no hearing is required under the statute, but were instead the product of unlawful Board ratemaking and thus were themselves unlawful. *Moss* v. *Civil Aeronautics Board*, 430 F.2d 891 (C.A. D.C.) (*Moss I*).

On remand the Board vacated the invalid Order and called for the filing of new tariffs effective October 15, 1970 (Order 70-7-128). The tariffs properly filed on that date thus ended the period during which the airlines had been charging unlawful fares.

2. Thereafter the Board granted a request by Congressman Moss and others that it conduct an investigation "to determine whether the fares charged from October 1, 1969 through October 14, 1970 were unjust and unreasonable, and, if so, to determine whether and to what extent other relief for fare-paying passengers, restoring overcharges unlawfully paid by them, or otherwise, may and should be granted" (Order 71-2-109, pp. 2-3). The Board noted the pendency of several district court actions against the airlines seeking recovery of part of the fares ruled unlawful in *Moss I*, and, partly to aid the disposition of these actions, deferred deciding whether it had the power to grant relief and turned directly to the question whether the complainants had any right to recover.[1]

Following a full hearing, the Administrative Law Judge found that the fares charged during the period of unlawfulness were not unjust or unreasonable, that the airlines had not been the recipients of overpayments,

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[1]Petitioner herein, the plaintiff in one of the district court actions, intervened at this point in the proceedings before the Board, but did not participate.

and that the passengers were therefore not entitled to restitution. The Board agreed that the fares had not been unjust or unreasonable, and concluded that there was no other basis for restitution (Order 73-7-39).[2] It thus found it unnecessary to decide whether it had the power to order refunds or grant any other type of relief.

On petitions for review, the court of appeals unanimously affirmed the Board's order in all respects. *Moss* v. *Civil Aeronautics Board*, 521 F.2d 298 (C.A. D.C.) (*Moss II*) (Pet. App. A, pp. 1-32). Petitioner seeks review of this decision.[3]

3. Petitioner initially filed a complaint in a California state court against several airlines seeking recovery for part of the fares charged during the period when the unlawful rates were in effect. That action was removed to the District Court for the Northern District of California, and then transferred, along with similar actions filed in other district courts, to the District Court for the Northern District of Illinois, *In re Air Fare Litigation*, 322 F. Supp. 1013 (J.P.M.L.), where they were stayed pending the Board's determination whether the fares were unjust or unreasonable. *Weidberg* v. *American Airlines, Inc.*, 356 F. Supp. 407 (N.D. Ill.). Upon the Board's decision those actions were dismissed. *Weidberg* v. *American Airlines,*

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[2]The Board found that several factors made restitution "particularly inequitable" under the circumstances of this case. The Board noted (1) that the tariffs filed pursuant to the formula prescribed in the Board's unlawful suspension order benefited the public by providing a fare structure substantially more cost-oriented than the pre-existing structure; (2) that had the Board not suspended the tariff revisions filed by the carriers, the public would have been required to pay, commencing in October 1969, substantially more than the rates specified in the Board's formula; and (3) that the fares in question were charged by the carriers in reasonable reliance on the Board's explicit approval of them.

[3]The other parties have not sought further review in this Court.

Inc., N.D. Ill., No. 70-C-1879, December 20, 1973, and on appeal the Court of Appeals for the Seventh Circuit affirmed, ruling that *Moss II* was dispositive of all the claims for relief therein asserted. *Roberts* v. *American Airlines, Inc.*, C.A. 7, No. 74-1108, decided December 8, 1975 (Pet. App. D, pp. 40-52). In reaching this conclusion, the Seventh Circuit stated that it had independently examined the issues passed upon by the court below in *Moss II*, and agreed completely with the decision therein (Pet. App. D, pp. 48-49, nn. 2-3).

ARGUMENT

Petitioner does not challenge the substantive decision of the Board that the rates charged between October 1, 1969, and October 14, 1970, were reasonable. Rather, the premise of his argument appears to be (Pet. 13-14) that the unlawfulness of the rates charged during that period, without regard to their reasonableness, entitles him to recovery. He claims that the Board has no power to pass retroactively on the reasonableness of the rates, and that the contrary decision of the court of appeals permits the Board unilaterally to "extinguish" his common law remedy of restitution, in derogation of the proper allocation of power between agencies and courts.

These arguments were correctly rejected by the court below, and the petition presents no issue warranting further review.

1. No one is automatically entitled to restitution for rates collected pursuant to a subsequently invalidated administrative order; this has been the rule at least since *Atlantic Coast Line R.R. Co.* v. *Florida*, 295 U.S. 301. In that case the Interstate Commerce Commission had prescribed a certain rate schedule to overcome an unjust discrimination against interstate commerce. This Court invalidated the schedule because of the inadequacy of the

Commission's statement of its underlying findings. The Commission thereupon approved the same rates upon more elaborate findings, and the Court upheld the schedule. A group of shippers then sought to recover the freight charges collected by the railroads under the invalidated Commission order.

In an opinion by Mr. Justice Cardozo, the Court said (295 U.S. at 309; citations omitted) that "[a] cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function. * * * The claimant to prevail must show that the money was received in such circumstances that the possessor will give offense to equity and good conscience if permitted to retain it." The Court ruled that, since the Commission's findings in support of the valid rate schedule showed that the procedurally defective rates had in fact been necessary to correct what would have otherwise been an unjust discrimination against interstate commerce, "restitution is without support in equity and conscience, whatever support may come to it from procedural entanglements" (*id.* at 312-313).

The principles enunciated in *Atlantic Coast Line* were subsequently applied in *United States* v. *Morgan*, 307 U.S. 183 and 313 U.S. 409, involving claims for restitution for rates filed pursuant to an order of the Secretary of Agriculture which had been reversed on procedural grounds. The Secretary determined in a retrospective investigation that the invalidated rates had not been unjust and unreasonable, and the claims for restitution were accordingly denied.

These decisions control this case. Here, as there, the tariffs declared invalid in *Moss I* were published in conformance with an agency order subsequently held unlawful for procedural defect. Petitioner's characterization of the

rates charged during the period of unlawfulness as the product of "collusive misconduct" by the Board and the carriers amounts simply to a misinterpretation of the facts. As the court in *Moss I* noted (430 F.2d at 894), the Board gave no forewarning whatever that it "might promulgate its own fare formula," and (430 F. 2d at 897) the "pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistible." Thus, as the court below (two members of which were on the panel in *Moss I*) observed (Pet. App. A, p. 31), "the fare structure in effect during the period in question was directly responsive to what the Board considered and represented to be lawful. And the carriers, as a practical matter, had no choice but to file the tariffs they did." In short, there is no reason here for the carrier to pay for the agency's error (*Atlantic Coast Line, supra,* 295 U.S. at 314), once it was shown, in findings petitioner does not dispute, that the rates charged during the period of unlawfulness were reasonable.

2. *Atlantic Coast Line* and *Morgan* also defeat petitioner's argument that the Board has no power retroactively to pass upon the reasonableness of past rates. In the former, the Court said that when the substance of a procedurally defective order was justified in light of the underlying facts giving rise to it, the agency's later determination to that effect was entitled to great respect: "The word when it goes forth invested with the forms of law may fix the consequences to be attributed to the conduct of the carrier in reliance upon an earlier word, defectively pronounced, but aimed at the self-same evil, there from the beginning. The Commission was without power to give reparation for the injustice of the past, but it was not without power to inquire whether injustice had been done and to make report accordingly" (295 U.S. at 312).

In *Morgan*, the Secretary of Agriculture had reduced the scheduled rates at the Kansas City stockyards, and while the order was under challenge an escrow fund was established by the district court into which was paid the difference between the old and new rates. When the new rates were ruled procedurally defective the district court held that the fund should be distributed among its contributors, on the ground that the Secretary could not retroactively establish valid rates for the period of past unlawfulness. The Court reversed. A new proceeding was pending before the Secretary in which he was free to pass upon the reasonableness of the past rates; while ordinarily there would be no occasion for such an investigation since the Secretary had no reparations power, the Court ruled that in the circumstances "the Secretary has the best of reasons to exercise his power to determine whether the rates were reasonable and may rightly do so, if his determination can afford a proper basis for the action of the district court in making disposition of the fund" (307 U.S. at 193).

The decision below, in recognizing the Board's power to pass upon the reasonableness of past rates, enhances rather than detracts from the proper allocation of responsibilities between the court and the agency. In determining the reasonableness of rates and weighing the equities of restitution in the economic context of the industry with which it has day-to-day familiarity, the Board simply exercised its expertise, as the primary jurisdiction doctrine requires. It did not "extinguish" (Pet. 7) common law remedies or usurp the proper function of courts in the adjudication of private disputes (Pet. 18-20). Moreover, the careful review of the Board's decision by the court below belies any suggestion that the court abdicated its judicial responsibilities "to the litigants and to the public" (*Morgan, supra*, 307 U.S. at 198).

"[C]ourt and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice" (307 U.S. at 191); rather, they are intended "through coordinated action" to pursue the goals of the statutory scheme establishing their responsibilities (*ibid.*). In this case the Board did first that which a regulatory, rate-making agency may be expected to do best, and the court of appeals then fulfilled its prescribed role by carefully considering the Board's view, recognizing the Board's expertise but insisting that the Board act reasonably and in accordance with law. As in *Atlantic Coast Line* and *Morgan*, "the administrative agency was not without power to inquire whether injustice had been done by the earlier rate, and the court, called on to ascertain, according to equitable principles, the rights of the parties with respect to payments made under the voidable order, could take into account the subsequent determination of the administrative agency as the basis of its action" (*Morgan, supra*, 307 U.S. at 196).

Hewitt-Robins, Inc. v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84, relied on by petitioner, is not to the contrary. There the Court held that a common law damage remedy for unreasonable routing of a shipper's goods was not inconsistent with the regulatory scheme of the Motor Carrier Act. 49 U.S.C. 301-327. The Court did not hold, as petitioner suggests (Pet. 18-19), that damages might be awarded by a court notwithstanding a proper finding of reasonableness by the Commission; rather, it noted that the Commission had ruled that the carrier's routing practices had been unreasonable (371 U.S. at 85), and that a judicial remedy was available *even though* the Commission (which was not then empowered to award reparations) had primary jurisdiction over the issue of reasonableness (*id.* at 88-89). In short, this decision fully supports the ruling by the court of appeals in the instant

case that the Board has the power to pass upon reasonableness in the first instance.[4]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JAMES C. SCHULTZ,
General Counsel,

GLEN M. BENDIXSEN,
Associate General Counsel,

ROBERT L. TOOMEY,
ALAN R. DEMBY,
Attorneys,
Civil Aeronautics Board.

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[4]Petitioner also claims (Pet. 21-22) that the Board exceeded the scope of the mandate in *Moss I* by initiating the investigation into the past rates. The investigation was initiated, however, as much in response to the request of the Moss parties as at the Board's own instance; moreover, the court of appeals itself was fully capable of construing its own mandate and found no fault with the Board in this respect.